91-1549

No. 91-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1991

NEW YORK STATE DEPARTMENT OF HEALTH,

Petitioner,

against

JOANNA ANDRULONIS, Individually and as Conservator of the Property of JEROME ANDRULONIS; UNITED STATES OF AMERICA; GLATT AIR TECHNIQUES, INC.; GLATT GmbH; WISCONSIN ALUMNI RESEARCH FOUNDATION, INC.; WARF INSTITUTE, INC.; RALTECH SCIENTIFIC SERVICES, INC.; RALSTON PURINA COMPANY; ELI LILLY AND COMPANY; and JOHN L. THOMPSON AND SONS COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

ROBERT ABRAMS
Attorney General of the State of New York
Attorney for Petitioner
The Capitol
Albany, NY 12224
(518) 474-8101

JERRY BOONE
Solicitor General
Counsel of Record

PETER H. SCHIFF
Deputy Solicitor General

MICHAEL S. BUSKUS
Assistant Attorney General
Of Counsel

Dated: March 26, 1992

THE REPORTER COMPANY, INC—Walton, NY 13856—800-252-7181
Syracuse Office, University Building, Syracuse, NY 13202—315-426-1235
NYC Office—30 Vesey St., New York, NY 10007—212-732-6978—800-800-4264
(1897A—LC5-929—1992)

Questions Presented

1. Whether the Second Circuit on remand (*see, New York State Dept. of Health v Andrulonis*, 112 S Ct 39, 116 L Ed 2d 18 [1991]), misinterpreted *United States v Gaubert*, 111 S Ct 1267, 113 L Ed 2d 335 (1991), and misapplied the discretionary function exception ("exception") of the Federal Tort Claims Act ("FTCA") by (1) virtually equating conduct immunized under the exception with non-negligent conduct; (2) holding that the errors and omissions by a Federal scientist did not implicate any "policy considerations" because the agency did not promulgate detailed regulations to circumscribe the conduct of its researchers; and (3) equating the scientific risk-assessment errors with negligent driving by a government chauffeur.

2. Whether the exception precludes liability for errors or omissions of a Government scientist in assessing the magnitude of risk of a public health experiment.

Parties

The parties to the proceeding in the court whose judgment is sought to be reviewed are:

1. Joanna Andrulonis, Individually and as Conservator of the Property of Jerome Andrulonis, Plaintiff;

2. The United States, Defendant and Third-Party Plaintiff;

3. The New York State Department of Health ("NYSDOH"), the Third-Party Defendant; and

4. Glatt Air Techniques, Inc.; Glatt GmbH; Wisconsin Alumni Research Foundation, Inc.; Warf Institute, Inc.; Raltech Scientific Services, Inc.; Ralston Purina Company; Eli Lilly and Company; and John L. Thompson and Sons and Company, Defendants.

All of the non-governmental defendants (# 4 above) settled with plaintiffs during trial and were not involved on the appeal to the Court of Appeals. Only parties ## 1-3 were, and still are, involved in this appeal.

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No. 91-

IN THE

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OCTOBER TERM, 1991.

NEW YORK STATE DEPARTMENT OF HEALTH,

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JOANNA ANDRULONIS, Individually and as Conservator of the Property of JEROME ANDRULONIS; UNITED STATES OF AMERICA; GLATT AIR TECHNIQUES, INC.; GLATT GmbH; WISCONSIN ALUMNI RESEARCH FOUNDATION, INC.; WARF INSTITUTE, INC.; RALTECH SCIENTIFIC SERVICES, INC.; RALSTON PURINA COMPANY; ELI LILLY AND COMPANY; and JOHN L. THOMPSON AND SONS COMPANY,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Opinions Below

The opinion of the court of appeals on remand ("*Andrulonis II*") (App, A406-A415)[2] is reported at 952 F2d 652 (1991).

This Court's memorandum decision (App, A405), which granted NYSDOH's earlier petition for certiorari and vacated and remanded for reconsideration in light of *United States v Gaubert*, 111 S Ct 1267, 113 L Ed 2d 335 (1991), is reported at 112 S Ct 39, 116 L Ed 2d 18 (1991).

The original opinion of the court of appeals ("*Andrulonis I*") (App, A1-A45) is reported at 924 F2d 1210 (1991).

The opinion of the district court (App, A46-A389) is reported at 724 F Supp 1421 (NDNY 1989). An earlier opinion of the district court (App, A390-A398) is reported at 593 F Supp 1336 (NDNY 1984).

Jurisdiction

The judgment of the court of appeals (App, A416-A417) was entered on December 30, 1991. This petition was filed on March 26, 1992. This Court has jurisdiction pursuant to 28 USC 1254(1).

Although no final judgment has been entered, in that a purely state-law question of the proper apportionment of settlement proceeds from private tortfeasors remains unresolved (*see* App, A41-A45; *Andrulonis I*, 924 F2d at 1226-27), no further action in the trial court will enhance the ripeness for review in this Court. *See*, Stern, Gressman & Shapiro, *Supreme Court Practice* (6th ed., 1986), § 418, pp 224-26. The court below definitively resolved the federal statutory question under the FTCA. Nothing that might occur on remand to

[2]References to "App" are to pages of the Appendix to the Petition.

the trial court will increase the ripeness of the federal question.

Statute Involved

28 USC § 2680(a)

> § 2680. Exceptions
>
> The provisions of this chapter [28 USC §§ 2671 *et seq.*] and section 1346(b) of this title shall not apply to—(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

Statement of the Case[3]

1. *Factual background and proof at trial.*

Plaintiff, a research scientist employed by the New York State Department of Health ("NYSDOH"), tragically contracted rabies and sustained permanent brain damage from exposure to an experimental rabies virus. App, A3. The experiment was conducted by NYSDOH scientists on NYSDOH premises. App, A3, A122, A217. The accident happened when airborne particles (aerosols) of rabies virus leaked from a Uni-Glatt machine. App, A6-A7. NYSDOH scientists had been using that machine to encapsulate the virus in sugar-coated

[3]References to "Tr. _____" refer to pages of the trial transcript. References to "Exh. _____" refer to trial exhibits. References to "J. App. _____" refer to pages of the Court of Appeals Joint Appendix.

tablets. App, A6-A7. The objective was to produce a vaccine which would be eaten by wildlife (e.g., foxes and raccoons) in order to immunize the animals from, and thereby prevent the spread of, rabies. App, A6-A7.

Although the experiment was devised, controlled and operated by NYSDOH scientists in a State laboratory, a Federal scientist offered advice and supplied the virus. App, A9, A122, A129-A130, A217. Dr. George Baer, the Chief of Viral Zoonosis Research at the Federal Center for Disease Control ("CDC"), was regarded as one of the world's leading rabies experts. App, A7, A9, A232. CDC's mission, as well as its policy of facilitating public health research, encouraged its scientists to share research results, etiologic agents (such as viral materials) and ideas with professional colleagues in the public and private sector. App, A7, A9; Tr. 2051-56, 2067-68, 2172-73. It was, therefore, entirely consistent with CDC policy that Dr. Baer would collaborate with NYSDOH researchers in furtherance of a public health experiment. App, A7, A9; Tr. 2051-56, 2067-68, 2172-73.

It is unnecessary to grasp the intricate details of NYSDOH's rabies research (App, A109-A150), or to focus on the specifics of this experiment (App, A150-A157), or to absorb the history of rabies research generally (App, A60-A109), in order to understand whether Dr. Baer's errors or omissions were protected by the Exception of the FTCA. After a brief factual background, we will demonstrate that Dr. Baer's errors and omissions—his failures properly to assess the risk of aerosol exposure to the rabies virus and to warn other sophisticated scientists that their research methods were unsafe—were within the protection of the exception.

The objective of NYSDOH's project was the creation of a vaccine, which is a modified virus. App, A7. Vaccines, which are attenuated or weakened viruses, work by creating anti-

bodies so that the body's own immune system can resist a "challenge" by later exposure to the disease. App, A7, A76.

NYSDOH had encountered technical difficulties in formulating a rabies vaccine. App, A9. Conventional laboratory techniques failed to yield a vaccine with enough potency, or titer. App, A9. Accordingly, NYSDOH asked for help from CDC's Dr. Baer, who was regarded as the "expert's expert" on rabies research. App, A7, A9. Dr. Baer agreed to, and later did, furnish a more potent strain of rabies virus which he had used at CDC. App, A8-A10.

Like other professionals potentially exposed to the rabies virus (e.g., veterinarians, postal delivery personnel), Dr. Baer had been vaccinated with the commercial (Eli Lilly) rabies vaccine. App, A8, A11, A91. Also, his blood levels of rabies antibody had been confirmed after testing. App, A8. NYSDOH and CDC researchers all assumed that, in the event of accidental exposure, they were not at risk. App, A8-A10. Despite accidental exposures to the most potent "street virus" from rabid animals in laboratories, no scientist immunized with the Lilly vaccine had ever contracted rabies. App, A8; Tr. 1027-28, 1421, 2113-14, 2224-25.

Dr. Baer, as a bystander and observer of the NYSDOH project, stood next to plaintiff during the experiment. App, A12. Although we will never know why plaintiff was the only scientist there to contract rabies, he was probably exposed to greater concentrations of the aerosol because he spent more time with the machine and was closer to the aerosol leak. App, A10, A12-A13, A66, A137.

Dr. Baer's error in gauging the risk of the NYSDOH experiment was his underestimation of the risk of aerosol exposure. App, A10-A11. NYSDOH and CDC scientists knew that there were two "routes of transmission" of the rabies virus: blood-

stream or aerosol (airborne). App, A11, A232-A233. In the more typical example, such as a dog bite, the rabies virus enters the body directly through the bloodstream. App, A10-A11, A54, A62, A68. For that route of transmission, the Lilly vaccine had always been effective. App, A11.

Plaintiff contracted rabies by the aerosol route of transmission after the Uni-Glatt machine leaked. App, A10-A11. The virus traveled from the nerve endings in his nasal mucosa directly to his brain. App, A11, A105-A107. Thus, the virus bypassed the rabies antibodies in the blood. App, A11, A105-A107.

At trial, plaintiff established that NYSDOH scientists had operated an unsafe laboratory, which lacked adequate containment devices to prevent aerosol exposures. App, A11. However, since State law barred tort suits against NYSDOH (plaintiff's employer) in that the receipt of workers' compensation benefits was an exclusive remedy, plaintiff's theory at trial was that the Government was a joint tortfeasor. App, A6. Plaintiff contended that CDC's Dr. Baer either should have halted the State project or should have warned that it was unsafe to conduct it in the NYSDOH laboratory. App, A22.

With expert testimony from risk-appraisal scientists, plaintiff proved that Dr. Baer, although he did not believe this virus posed dangers in the event of aerosol exposure, *should have known* than an aerosol exposure was dangerous. App, A11, A233; Tr. 985-87, 999-1000, 1003, 1030, 1087-89, 1479-83. Like other rabies experts, Dr. Baer was certainly aware of the theoretical danger of aerosol exposure. Tr. 1038, 1176, 2138-39. Indeed, Dr. Baer was the expert's expert, having written countless articles and edited the definitive two-volume scientific treatise on rabies. Exh 112, *The Natural History of Rabies*; J.App. at 4735-5590; Tr. 111, 2330.

Although Dr. Baer negligently underestimated the risk of aerosol exposure, App, A11, his error was grounded in scientific reasoning. He knew that the scientific literature, including the rabies treatise he edited, had documented the aerosol route of transmission of the disease, but, to borrow a legal metaphor, he believed that those cases were distinguishable. Tr. 1172-76. Dr. Baer was aware that a public health worker and a mining engineer doing work in bat caves had apparently contracted rabies from an aerosol route of exposure. App, A94-A99. However, the cave workers' levels of exposure were perceived to be have been much higher and, more critically, they had *not* been immunized with the commercial vaccine, which was first distributed in 1957. App, A90, A94-A99; Tr. 1175, 2310. Thus, Dr. Baer believed that exposure to aerosols in a laboratory posed no dangers for scientists immunized with the commercial vaccine. App, A205-A206; Tr. 880-881, 2139, 2252, 2254, 2258-59, 2312-14, 2322, 2324.

There was one prior case of a laboratory worker who contracted rabies. App, A99-A100. A scientist in Texas contracted rabies after inhaling aerosols produced by mixing rabies materials in a blender. App, A100. However, that case was distinguishable from this case because the Texas laboratory worker had been vaccinated some 13 years before the accident, but had *not* developed demonstrable blood antibodies. App, A100. Thus, it was as if he had never been immunized. App, A100-A101.

Additionally, the Texas blender incident was distinguishable because that scientist was using the so-called "Challenge Virus Standard" ("CVS"), the particularly lethal strain used as the benchmark virus to "challenge" or kill animals as a means of assaying the effectiveness of vaccines previously administered. App, A85-A86, A99-A100; Tr. 1032-34. In contrast to the CVS virus which killed the Texas laboratory worker, Dr. Baer furnished NYSDOH with an "ERA" strain

of rabies virus, which is an attenuated strain used to immunize animals. App, A126-A128; Tr. 1033-34, 2138-39.

Moreover, the viral strain which Dr. Baer brought from CDC to NYSDOH's laboratory had proven not dangerous to foxes, a species peculiarly susceptible to rabies and therefore regarded as an "indicator species" for the pathogenicity of a virus. App, A145; Tr. 1209, 1211, 2143-48. The few adverse effects upon some animal species which had been documented in the scientific literature were discounted on factual or scientific grounds as not suggesting any real risks for man. Tr. 1176, 2255, 2258, 2265-66.

Therefore, on the basis of his knowledge and expertise, Dr. Baer discounted as insignificant, albeit mistakenly, the risk of exposure to rabies aerosols. App, A233; Tr. 1032, 1173-74, 1884, 1979-80, 2255, 2313-14. With the benefit of hindsight, everyone recognizes that Dr. Baer tragically miscalculated the risk to which he exposed himself and plaintiff.

2. *Decisions of the courts below*:

The district court held the Government liable for Dr. Baer's mistakes. *Andrulonis v United States*, 724 F Supp 1421 (NDNY 1989); App, A46 *et seq.* Because NYSDOH was only a third-party defendant, the court recognized that NYSDOH's negligence with respect to unsafe laboratory conditions could not give rise to liability of the Government. 724 F Supp at 1472; App, A181. The court found that the State scientists were sophisticated members of the "community of rabies experts" who were assumed to know the theories and concepts of rabies work. 724 F Supp at 1474; App, A187. The court also found that NYSDOH scientists should have known the following: that pathogenicity of viruses could not be known for certain; that safe laboratory practice required researchers to assume that the experimental strain was dangerous to humans;

that the concentration of a virus directly affects its pathogenicity; that aerosol exposure should be avoided; and that the Lilly vaccine could not guarantee safety against aerosol exposure. 724 F Supp at 1475-76; App, A188-A195. The court also found that NYSDOH scientists knew that the Uni-Glatt machine they were using was not airtight. 724 F Supp at 1476; App, A193.

From all of those facts, the district court found that NYSDOH should have been able to anticipate that this experiment was unsafe, particularly given the absence of containment devices in the NYSDOH laboratory. 724 F Supp at 1476-79; App, A198-A202.

The district court then detailed why the Government was liable for failure to warn. 724 F Supp at 1481-1496; App, A210-A256. The court found that since Dr. Baer had superior knowledge about rabies, he should have made sure that NYSDOH's scientists were fully aware of all of the dangers associated with this experimental virus. 724 F Supp at 1488-89; App, A232-A236. The court held that because Dr. Baer knew that NYSDOH's laboratory did not have safety equipment that would have minimized or averted aerosol exposure, he should have warned NYSDOH scientists not to continue the experiment. 724 F Supp at 1490-93; App, A238-A248.

The court, which had earlier denied the Government's motion to dismiss on the basis of the exception, *Andrulonis v United States*, 593 F Supp 1336 (NDNY 1984); App, A390-A398, gave very brief mention to it. 724 F Supp at 1496-98; App, A256-A264. The court relied heavily upon *Indian Towing Co. v United States*, 350 US 61 (1955). *Andrulonis*, 724 F Supp at 1497; App, A259-A260. The court hinged its analysis on the planning/operational distinctions which it understood to be the measure of the exception. 724 F Supp at 1497-98; App, A259-A260.

The court of appeals affirmed, holding that the exception did not apply. *Andrulonis I,* 924 F2d 1210, 1217-20; App, A15-A23. The court applied what it understood to be a two-part test derived from *Berkovitz v United States,* 486 US 531 (1988). *Andrulonis I,* 924 F2d at 1218; App, A18-A19.

> First, we must consider whether the conduct was a matter of choice for the acting employee, and if so, we must then determine whether the employee's actions involved public policy considerations. 924 F2d at 1218; App, A18.

The court acknowledged that there was no statute, regulation or any other directive which mandated what Dr. Baer should have done or which forbade him from what he did. 924 F2d at 1218; App, A19.

> No such directive was applicable to Dr. Baer in this case; at the critical points in these events he had the power to choose his actions. 924 F2d at 1218; App, A19.

Thus, in the view of the Second Circuit, Dr. Baer's conduct was "discretionary" in the sense of not being circumscribed by regulations as in *Berkovitz. Andrulonis I,* 924 F2d at 1218; App, A19.

> But this does not end the inquiry. As we have noted, to qualify for the exception, Dr. Baer's critical choices had to involve policy considerations, and here they did not. 924 F2d at 1218; App, A19.

The court also relied on the operational/planning dichotomy

which the Second Circuit had embraced on authority of *Indian Towing*.[4] *Andrulonis I*, 924 F2d at 1218-19; App, A19-A20.

The court conceded that the execution of policy decisions might occasionally be protected by the exception. 924 F2d at 1219; App, A21. However, actions to implement policy would be protected only "when the steps in the execution process also require policy judgments". 924 F2d at 1219; App, A21. Essentially, the court required proof of conscious, deliberate and explicit balancing of risks, benefits and costs; in the absence of such an evidentiary record, the Government would not be protected by the exception. 924 F2d at 1219; App, A21.

Applying those principles to this case, the court held that the Government's decisions to encourage rabies research, to provide funding to NYSDOH and to furnish the virus were all protected "policy" decisions. 924 F2d at 1219; App, A22.

> The same is not true, however, with Dr. Baer's alleged failure to warn of the extreme dangers presented by the particular circumstances of the March 29th experiment which Dr. Baer failed to interrupt. The situation simply did not lend itself to policy balancing, not [*sic*] is there any indication that Dr. Baer considered the policy implications or the pros and cons of allowing the experiment to proceed. Once he became aware of the risks, Dr. Baer was obligated to give warning. His is precisely the type of negligent omission for which congress waived the government's sovereign immunity in order to provide redress to citizens for the torts of government actors. 924 F2d at 1219; App, A22.

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[4]See, *e.g.*, *Caraballo v United States*, 830 F2d 19, 21-22 (2d Cir 1987) (the manner of patrolling a national park was not discretionary); and *Eklof Marine Corp. v United States*, 762 F2d 200, 203 (2d Cir 1985) (the manner of marking navigation obstacles was not discretionary). *Eklof Marine* was sharply criticized by the First Circuit in *Brown v United States*, 790 F2d 199, 202 (1st Cir 1986), *cert. den.*, 479 US 1058 (1987).

NYSDOH filed a petition for certiorari. *New York State Dept. of Health v Andrulonis*, No. 90-1864. This Court granted the petition, vacated the judgment and remanded for further consideration in light of *United States v Gaubert*, 111 S Ct 1267, 113 L Ed 2d 335 (1991). *New York State Dept. of Health v Andrulonis*, 112 S Ct 39, 116 L Ed 2d 18 (1991); App, A405.

After further briefing but without oral argument, the Second Circuit reinstated its original decision. *Andrulonis II*, 952 F2d 652 (1991); App, A408-A415. The court stated that "*Gaubert* does not undermine our original opinion". *Andrulonis II*, 952 F2d at 652; App, A408. The court denied that, in its first opinion, it had relied heavily on *Indian Towing* or had adopted the planning/operational dichotomy on authority of *Indian Towing*. *Andrulonis II*, 952 F2d at 654; App, A412-413; *but see*, *Andrulonis I*, 924 F2d at 1218-19; App, A17-A18. The court interpreted *Gaubert* as limiting the scope of the exception to actions and decisions demonstrably based on considerations of public policy. *Andrulonis II*, 952 F2d at 654; App, A412.

In defining what "policy" was protected by the exception, the court claimed to find support in *Gaubert* for the conclusion that the Government must demonstrate conscious balancing of risks and benefits. *Andrulonis II*, 952 F2d at 655; App, A413-A414.

> The government also argues that Dr. Baer's decision to allow the experiment to proceed was necessary to fulfill the policy objectives of the CDC and as such, should be protected by the exception. It interprets *Gaubert* as focusing on whether the government agent was allowed discretion, *not whether he actually contemplated different policy implications*. *Andrulonis II*, 952 F2d at 655; App, A413-A414 (emphasis added).

The court also understood *Gaubert* to stand for the proposition that comprehensive regulations implied wide discretion, with the converse also true. *Andrulonis II*, 952 F2d at 655; App, A414. The court believed that the outcome in *Gaubert* hinged on the fact that the Federal Home Loan Bank Board had "a clear regulatory scheme [which] entrusted government agents with discretionary powers to effectuate a clearly-defined policy." *Andrulonis II*, 952 F2d at 655; App, A414. Because CDC did not have a detailed set of regulations to circumscribe the conduct of CDC scientists, the Second Circuit held that *Gaubert* was distinguishable. *Andrulonis II*, 952 F2d at 655; App, A414.

With respect to its conclusion that the errors in risk-assessment by Dr. Baer did not involve any "policy", the court focused on the result of injury and, reasoning backwards and with the benefit of hindsight, stated that "it is hardly conceivable that the CDC would ever have a policy to keep silent about obvious, easily-correctable dangers in experiments using drugs supplied by the CDC." *Andrulonis II*, 952 F2d at 655; App, A414. The court then likened Dr. Baer's errors in assessing the risk of this research project to mundane errors of a government chauffeur in driving an automobile. 952 F2d at 655; App, A414-A415.

On the basis of that additional explanation and interpretation of *Gaubert*, the court reinstated its original opinion. *Andrulonis II*, 952 F2d at 655; App, A415.

REASONS FOR GRANTING THE WRIT

The Second Circuit took much too narrow a view of "policy" and "discretion", contrary to the plain thrust of *Gaubert* and previous cases. Additionally, the decision below conflicts with many analogous cases from other circuits.

There are several reasons to grant this Petition.

First, the court below took much too narrow a view of the discretionary function exception. The Second Circuit interpreted *Gaubert* as pivoting on the existence of a comprehensive scheme of regulations. Because CDC had not promulgated detailed regulations to dictate how scientists engaged in cooperative research should act, the court below inexplicably inferred that a CDC scientist, visiting a laboratory run by other, competent scientists, had no discretion in how to deal with those other scientists. Contrary to the view of the Second Circuit, *Gaubert* did not hold that the absence of regulations negated the existence of broad discretion. Additionally, the court below defined "policy" so narrowly that it practically equated it with non-negligent conduct. Finally, the court below came to a preposterous conclusion by equating risk-assessment errors in theoretical and experimental research with mundane driving errors of a governmental chauffeur.

The decision below is also in conflict with opinions in other circuits. Other courts have construed the exception much more broadly to cover negligent risk-assessments or negligent failures to warn. Examples include misjudging the dangers of open-air testing of nuclear weapons, failing to warn miners of known hazards of mining uranium, failing to follow safe procedures in the clean-up of toxic spills, failing to adopt better safety precautions for the transportation of bombs, failing to enforce workplace safety rules on the premises of

Government contractors where the Government retained a contract-based right to suspend production or work in the event of safety hazards, and failing adequately to test or warn about the Swine Flu vaccine prior to promoting and distributing it to the general public. The list could readily be expanded. The point is that the overwhelming consensus of decisions outside the Second Circuit have interpreted the exception to cover negligent acts or omissions where there was no violation of mandatory regulations.

Finally, the decision below is also in conflict with the prevailing view in other circuits with respect to the burden of showing that Governmental conduct is "discretionary" or embraces permissible "policy" considerations. The majority of circuits have adopted and applied the "susceptible to policy" test by which the Government enjoys the benefit of the exception even if it is not able to demonstrate a conscious, deliberate "balancing" or risk-evaluation prior to the act or omission giving rise to liability. The Second Circuit rejected this rule, holding that Dr. Baer's conduct could not have involved permissible "policy" because he had not given enough advance thought to the risks.

We will now amplify these reasons for granting the Petition.

I.

The decision below is in direct conflict with *Gaubert*. The Second Circuit held that Dr. Baer's errors in judging the risk of a public health research project were not within the exception because ignoring unsafe laboratory conditions did not implicate any "policy" considerations. *Andrulonis II*, 952 F2d at 655; App, A415. Yet, the court offered no guidance to distinguish mere negligence from conduct outside the scope of the exception and, astonishingly, equated the errors of Dr. Baer—the Chief of Viral Zoonosis research for CDC—with

bad driving by a government chauffeur. 952 F2d at 655; App, A414-A415. The court also distinguished the case at bar from *Gaubert* on the basis that CDC did not channel, confine or circumscribe policy for its scientists, whereas the Federal Home Loan Bank Board in *Gaubert* had "a clear regulatory scheme [which] entrusted government agents with discretionary powers to effectuate a clearly-defined policy." *Andrulonis II*, 952 F2d at 655; App, A414.

That analysis is directly contrary to *Gaubert* because, rather than presuming discretion based on the absence of a mandatory regulation, the Second Circuit presumed the *absence of discretion* unless a regulatory scheme explicitly conferred broad discretion. In holding that *Gaubert* did not apply, the Second Circuit stated that CDC had "neither a regulatory framework nor a defined policy that could serve as the basis for infusing all decisions of CDC employees with policy implications." *Andrulonis II*, 952 F2d at 655; App, A414.

This Court did not say in *Gaubert* that the absence of regulations equated with the absence of discretion. The considerable weight of pre-*Gaubert* precedent held that the failure to promulgate regulations was, itself, a discretionary decision protected by the exception. Comment, *The Discretionary Function Exception and Mandatory Regulations*, 54 U Chi L Rev 1300, 1332 (1987) ("The discretion of the government in promulgating, or failing to promulgate, regulations is unquestioned"); *Weiss v United States*, 889 F2d 937, 939 (10th Cir 1989); *Shuman v United States*, 765 F2d 283, 291 (1st Cir 1985); *Hylin v United States*, 755 F2d 551, 554 (7th Cir 1985).

Thus, the decision of the Second Circuit can only be described as a strained reading of *Gaubert* and one seriously out of step with the mainstream of decisional law on the exception.

II.

The decision below also conflicts with the decisions of other courts of appeals which have refused to define the exception so narrowly that mere common law negligence is not covered by the exception. The court below placed emphasis on the fact that the negligence here involved safety precautions and, from that premise, came to the conclusion that no "policy" could have been implicated since no permissible "policy" would tolerate any safety hazard. *Andrulonis II*, 952 F2d at 655; App, A415. Aside from the fact that the same argument was rejected long ago in *Dalehite v United States*, 346 US 15, 37-38 (1953) (involving safety hazards in the storage, handling and labelling of an explosive substance), it has been consistently rejected in the other circuits. Despite compelling proof of common law negligence with respect to lapses in safety or the failure to warn, the other circuits have refused to equate common law negligence with conduct outside the coverage of the exception. *See, e.g., Kennewick Irrigation Dist. v United States*, 880 F2d 1018, 1030 (9th Cir 1989) ("Such a rule would collapse the discretionary function inquiry into the basic issue of negligence"); *Allen v United States*, 816 F2d 1417, 1421 (10th Cir 1987), *cert. den.*, 484 US 1004 (1988) ("It is irrelevant to the discretion issue whether the [Government] or its employees were negligent in failing to protect the public"); *General Public Utilities Corp. v United States*, 745 F2d 239, 243-245 (3d Cir 1984), *cert. den.*, 469 US 1228 (1985) (same).

The Second Circuit took the view that no "discretion" or "policy" was involved because Dr. Baer should have known better. *Andrulonis II*, 952 F2d at 655; App, A414-A415. That view might have had some validity if this case had involved an accident within a CDC laboratory, because CDC had a Laboratory Safety Manual (Exh G-136; J.App. at 9243-9445) which would have required its own scientists to use aerosol-containment devices in a CDC laboratory. App, A238. However, the

Second Circuit ignored the fact that there was absolutely no CDC regulation, practice, or rule requiring a CDC scientist visiting the laboratory of another competent scientist to attempt to tell that scientist how to run his own laboratory. Moreover, as we have already demonstrated in our Statement of the Case (*supra,* pp 5-8), Dr. Baer did not actually know the hazard posed by exposure to this virus and, in fact, obviously believed that the Lilly vaccine would be adequate protection since he put himself in the same laboratory conditions in which plaintiff worked. Thus, the court below failed to recognize that the decision of a visiting scientist (CDC's Dr. Baer) not to interfere with the project of another competent scientist (NYSDOH's Dr. Debbie) was itself a discretionary decision by Dr. Baer. App, A120, A151, 263-264; Tr. 2074-77, 2170, 2180.

The Second Circuit's findings that Dr. Baer should have intervened to stop NYSDOH's project (*Andrulonis I,* 924 F2d at 1219; App, A22; *Andrulonis II,* 952 F2d at 655; App, A413-A414), are in conflict with cases involving the Government's failure to exercise a contractually-retained right to intervene in the event of safety violations by an independent contractor. Those cases hold that however blatant or obvious the safety hazard on someone else's premises, when the Government has delegated safety decisions to such contractors, the act of delegating safety responsibility is itself the discretionary decision protected by the exception. *Feyers v United States,* 749 F2d 1222, 1226-27 (6th Cir 1984), *cert. den.,* 471 US 1125 (1985) ("the decision to delegate responsibility for safety to Chrysler was based on a perception by government negotiators that Chrysler was a prudent contractor capable of implementing its own safety program"); *Shuman v United States,* 765 F2d 283, 292-93 (1st Cir 1985) (decision to delegate safety decisions to an independent contractor doing governmental work was discretionary, even though the practical effect was that there was little or no safety program); *In re Consolidated U.S. Atmo-*

spheric Testing Litigation, 820 F2d 982, 995-96 (9th Cir 1987), *cert. den. sub nom. Konizeski v Livermore Labs*, 485 US 905 (1988) (same); *Johns v Pettibone Corp.*, 843 F2d 464, 467 (11th Cir 1988) ("safety decisions represent an exercise of discretion giving rise to governmental immunity"); *see also, Thompson v Dilger*, 696 F Supp 1071, 1077-79 (ED Va 1988) (actions of Government in aiding and encouraging an inventor in the development of an armor-piercing rifle included a discretionary determination that the inventor was sufficiently knowledgeable about safety so that the Government need not supervise or control his conduct).

The decision below also conflicts with many decisions which have construed the exception broadly to encompass judgmental errors in risk-assessment. *Boruski v United States*, 803 F2d 1421, 1429 (7th Cir 1986) (approval of vaccines for Swine Flu vaccination program); *Wells v United States*, 851 F2d 1471, 1476-78 (DC Cir 1988), *cert. den.*, 488 US 1029 (1989) (assessment of the risks to a residential neighborhood posed by a lead smelter); *United States Fidelity & Guar. Co. v United States*, 837 F2d 116, 120-23 (3d Cir), *cert. den.*, 487 US 1235 (1988) (assessment of the risks to a residential neighborhood posed by cleanup of a leaking toxic tank car); *Creek National Indian Housing Authority v United States*, 905 F2d 312, 313-14 (10th Cir 1990) (selection of safety precautions for purposes of transporting bombs on public highways); *Totten v United States*, 806 F2d 698, 700-02 (6th Cir 1986) (cleanup of hazardous solid rocket fuel); *General Public Utilities Corp. v United States*, 745 F2d 239, 243-46 (3d Cir 1984), *cert. den.*, 469 US 1228 (1985) (errors by nuclear safety experts in underestimating the significance of prior incidents at Three Mile Island).

The decision below also conflicts with many "failure to warn" cases where complaints were dismissed on the basis of the exception despite compelling expert proof that the Gov-

ernment knew of particular safety hazards but failed to warn those demonstrably at risk from the hazard. *See, e.g., In re Consolidated U.S. Atmospheric Testing Litigation,* 820 F2d 982, 985 (9th Cir 1987), *cert. den. sub nom. Konizeski v Livermore Labs,* 485 US 905 (1988) (open air nuclear testing without warning area residents of the risks of nuclear fallout); *Allen v United States,* 816 F2d 1417, 1423-24 & n 8 (10th Cir 1987), *cert. den.,* 484 US 1004 (1988) (same); *Barnson v United States,* 816 F2d 549, 553-57 (10th Cir), *cert. den.,* 484 US 896 (1987) (decisions of Public Health Service and Surgeon General not to warn about the health hazards of working in uranium mines); *Begay v United States,* 768 F2d 1059, 1064-66 (9th Cir 1985) (same); *First Nat. Bank in Albuquerque v United States,* 552 F2d 370, 374-77 (10th Cir), *cert. den.,* 434 US 835 (1977) (approval of warning labels for fungicide which caused mercury poisoning in children); see also, *Fried v United States,* 674 F Supp 636, 638-40 (ND Ill 1987) (furnishing radioactive isotopes to a private university without taking precautions for handling and storage of those substances); contra, *Routh v United States,* 941 F2d 853, 855-857 (9th Cir 1991) (the failure of a United States Forest Service contracting officer to require a contractor to provide adequate safety equipment was not a public policy decision).

In virtually every one of the cases just cited (*supra,* pp 18-20), the courts either found that plaintiff had proved, or assumed that plaintiff could prove, that the Government's errors and omissions were negligent when judged either by a common law tort standard of reasonable care under the circumstances or by a professional malpractice standard. In some of the cases, impressive expert testimony bolstered plaintiffs' theories that the Government woefully underestimated the risks of a particular activity. *See, e.g., Allen v United States,* 588 F Supp 247, 260-329 (D Utah 1984) (detailing expert proof of what Government scientists either knew or should have known when they conducted open-air atomic tests), *revd,*

816 F2d 1417, *supra.* Yet, the courts dismissed the complaints on the basis that the errors or omissions were discretionary, judgmental decisions protected by the exception, notwithstanding that human safety was compromised by erroneously made decisions.

III.

The decision below is also in conflict with *Myslakowski v United States,* 806 F2d 94, 96-97 (6th Cir 1986), *cert. den.,* 480 US 948 (1987), and similar cases which apply the "susceptible to policy analysis" test to determine whether particular conduct is protected by the exception. This test gives the Government the benefit of the exception even when the Government is not able to prove that advance, conscious risk-assessment decisions were made. The Sixth Circuit in *Myslakowski* held that the decision by the Government to dispose of surplus jeeps on an "as is" basis was protected by the exception. Despite the fact that the Government was actually aware of the propensity of the jeeps to roll over (since a Cornell Aeronautical Laboratory test and report had warned the Government of the hazard), the court held that negligent failure to warn purchasers of those surplus jeeps was embraced within the scope of the exception. *Myslakowski,* 806 F2d at 97-98. Most other circuits are in accord. *See, e.g., Sea-Land Service, Inc. v United States,* 919 F2d 888, 892 (3d Cir 1990), *cert. den.,* 111 S Ct 2235, 114 L Ed 2d 477 (1991); *Kennewick Irrigation Dist. v United States,* 880 F2d 1018, 1028 (9th Cir 1989); *Allen v United States,* 816 F2d 1417, 1422 n 5, 1423-24 & n 8 (10th Cir 1987), *cert. den.,* 484 US 1004 (1988); contra, *Dube v Pittsburgh Corning,* 870 F2d 790, 798-99 (1st Cir 1989).

The Second Circuit initially stated its acceptance of the "susceptible to policy analysis" test. *See, In re Joint Eastern & Southern Dist. Asbestos Litigation (Robinson),* 891 F2d 31,

37 (2d Cir 1989). However, for reasons not clearly stated in *Andrulonis I* or in *Andrulonis II*, the court below did not apply the "susceptible to policy analysis" test in the same manner in this case. While purporting to apply that test, the Second Circuit found that Dr. Baer was not engaged in policy-making because he failed to consider the relevant risks. *Andrulonis I*, 924 F2d at 1219; App, A21-A22; *Andrulonis II*, 952 F2d at 655; App, A415. The court never explained why Dr. Baer's errors and omissions — in failing to consider, or discounting as insignificant, the risk of aerosol exposure — could be described as *not* involving "policy" when a panoply of comparable risk-assessment errors have been treated by other courts of appeals as discretionary matters implicating policy.

Likewise, Dr. Baer's decision to defer to the competency of NYSDOH scientists after delivering the virus was a judgmental, policy decision. Tr. 1155, 1162-63, 2070-74. While plaintiff established Dr. Baer's negligence in the classic common-law sense, the record established that Dr. Baer, in fact, had the authority and discretion to make judgments as to the competence of NYSDOH to receive and handle etiologic substances such as this rabies virus. Tr. 2186, 2263-64. Dr. Walter Dowdle, the Deputy Director of CDC, explained it as follows in his testimony (J.App. 2185):

> Q. Dr. Dowdle, in 1976 and up to March of 1977, were there any standards which governed the CDC practice in providing etiologic agents to another laboratory?
>
> A. At the Class 2 level and even at the Class 3 level, the responsibility there rests with the experts in that particular area. In other words, the branch chief had the authority to provide those strains to people that he felt competent to receive them.

> Q. With respect to rabies viruses in 1976 and 1977, with whom did that discretion lie?
>
> A. Dr. Baer.

Even after remand in light of *Gaubert*, the Second Circuit failed to explain why it interpreted the "susceptible to policy analysis" test differently from the other courts of appeals. Instead, the court seemed determined to justify and adhere to its original decision in *Andrulonis I*. In reasoning that proceeded backwards from the fact of injury, the court characterized the limits of permissible "policy" as not including any errors or omissions which lead to injury. *Andrulonis II*, 952 F2d at 655; App, A415.

> Looking at the 'nature of the conduct' in this situation, we do not see how Dr. Baer's negligent omission could possibly have been grounded in CDC's policy scheme. Nothing indicates that CDC policy required, or even encouraged, Dr. Baer to ignore unsafe laboratory conditions and thereby unnecessarily place the lives of laboratory workers at risk in order to further a scientific cause or any other objective of the government. The general policy of wanting to eradicate rabies and granting officials some discretion to achieve those ends is far too broad and indefinite to insulate Dr. Baer's negligent conduct in the circumstances of this case. 952 F2d at 655; App, A415.

This conflict in the circuits on so basic a point as the "burden of proof" or the required evidentiary showing that a decision embraces "discretion" is further reason to grant the petition.

CONCLUSION

This Court should grant the writ

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Respectfully submitted,

ROBERT ABRAMS
Attorney General of the State of New York
Attorney for Petitioner

JERRY BOONE
Solicitor General
Counsel of Record

PETER H. SCHIFF
Deputy Solicitor General

MICHAEL S. BUSKUS
Assistant Attorney General

Of Counsel